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LIABILITY OF MASTER FOR WILFUL OR MALICIOUS ACTS OF SERVANT.

I.

§ 1. IN GENERAL.—While it is well settled that the principal or master is responsible to third persons for the negligent act of his servant or agent, committed within the scope of his authority, it has been held in many cases that he is not liable for the agent's wilful or malicious act. In the language of Judge COWEN,[1] which fairly states the doctrine of these cases, "the dividing line is the wilfulness of the act."

It is perhaps not strange that a distinction in the master's responsibility for negligent acts and for wilful acts should constantly present itself. The very idea of negligence in the servant suggests the case wherein the servant is performing the master's business, but doing it heedlessly, inattentively, without definite purpose, without sufficient mental attention to it to do it properly. When, however, it is suggested that the servant was acting wilfully a different situation presents itself. Instead of mental inaction, mental activity is the situation at once presented. Instead of purposeless inattention, a definite purpose, a distinct motive is now suggested, and whose motive is it? At this point a further distinction must be observed. What is meant by "wilfully"? It may mean no more than a conscious purpose and intent to perform the master's business, and in this view is wholly commendable and in furtherance of the master's interests. On the other hand, the expression may be used, in the language of the Century dictionary, "with an implication of evil intent or legal malice, or with absence of reasonable ground for believing the act in question to be lawful." It is undoubtedly in this latter sense that the expression is ordinarily used in this connection. Inasmuch as it can rarely be supposed that the master has authorized

[1] In Wright v. Wilcox, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507.

or directed a wilful or malicious act, the conclusion seems now natural and reasonable that the servant is effectuating his own purpose and motive, and that for the time being, at least, he has ceased to represent his master. What he does, then, while so acting, is, it is said, his own act and not the act of his master.

§ 2. ———. Before accepting these conclusions, however, a number of considerations must be taken into account. If the servant or agent, even though for a short period, goes outside of his employment,—if abandoning his service, though even for a moment, he steps aside to commit an act which has no relation to his master's business, which is in no way incident to it, which has no tendency to further or promote it, and which was done merely to accomplish some wilful or malicious purpose of the servant only, it may well be that the master should not be held responsible. But if, on the other hand, the act be one which the servant might, as such, perform with a proper motive; if the act be incident to the employment; if it be done to further the master's interests and not the servant's; if the master's business was thereby done or attempted to be done, although the motive which prompted the doing of it at that time or place or in that manner, was a wanton or wilful or malicious one, a different conclusion might be justified. Is it anything else than doing the master's business—with a different and perhaps a wrong motive it may be, but still a performance of the master's business? Certain it is, at any rate, that the tendency of the modern cases is to attach less importance to the motive with which the act is done and to give more attention to the question as to whose business was being done and whose general purposes were being promoted.

§ 3. ———. There are also several groups of cases in which it is sometimes said that, by reason of the peculiar nature of the master's duty, the essential ground of complaint is that the duty was not performed, and if in such cases the master confides its performance to his servant, the question of the motive from which the servant failed to perform the duty can have no other effect than to aggravate the consequences for the non-performance. Before taking up the question of the master's general liability for his servant's wilful or malicious acts it may be well to consider these cases which are supposed to stand upon some peculiar ground.

§ 4. I. WHERE THE MASTER OWED THE PLAINTIFF A SPECIAL DUTY.—It is not infrequently said that where the principal or master owes to the plaintiff the performance of some special and particular duty, and confides the performance of this duty to a servant or agent he will be responsible to the plaintiff if the duty be not performed by such servant or agent, and in such a case, the fact that the

servant or agent acted wantonly, wilfully or maliciously, will, instead of tending to exonerate the principal or master, only serve to aggravate the injury. The gist of the complaint is that the duty has not been performed, and this is the fact, while to this wrong of non-performance, there is added the aggravating circumstance that the non-performance was wanton, wilful or malicious.

§ 5. ———. This theory has often been advanced, for example, in the case of carriers of passengers. While carriers of persons are not insurers of the safety of their passengers they are bound to exercise the highest degree of care for their safety and protection. Their duty extends not only to protection against the inanimate agencies employed, but also against attacks by persons within and without the conveyance; not only this, but there is also an implied stipulation on their part, says Judge STORY, "not for protection merely, but for respectful treatment, for that decency of demeanor which constitutes the charm of social life, for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females, it proceeds yet further; it includes an implied stipulation against general obscenity, that immodesty of approach which borders on lasciviousness and against that wanton disregard of the feelings which aggravates every evil." If the master commits the performance of this duty to his servant, he must answer for the servant's non-performance of it. If he would be answerable for a failure to protect the passenger as against strangers, *a fortiori* is he liable where the assailant is not a stranger but his own servant.

As has been often pointed out, the liability in these cases does not rest so much upon the doctrine of *respondeat superior;* as upon the non-performance of a special duty.

§ 6. ———. This principle has been applied in a great variety of cases. Thus where a railway brakeman assaulted and grossly insulted a passenger, upon the false pretense that the passenger had not surrendered his ticket, the company was held liable.[2] And the same result ensued where the conductor of a passenger train had wilfully and wrongfully caused passengers to be ejected from the train;[3] where the steward and some of the table waiters upon a passenger-boat wrongfully and without provocation assaulted a passenger;[4] where the conductor of a passenger train kissed a female pas-

[2] Goddard v. Grand Trunk Ry., 57 Me. 202, 2 Am. Rep. 39.

[3] Passenger R. R. Co. v. Young, 21 Ohio St. 518, 8 Am. Rep. 78.

[4] Bryant v. Rich, 106 Mass. 180, 8 Am. Rep. 311; same point, Sherley v. Billings, 8 Bush (Ky.) 147, 8 Am. Rep. 451.

senger against her will;[5] where a brakeman struck a passenger in the face with a lantern because the passenger, who had lost his watch, said he thought the brakeman had it;[6] where the driver of a street railroad car maliciously assaulted a passenger because the passenger expostulated with the driver about an assault made by the driver upon another person outside the car;[7] and where a railway brakeman made a malicious assault upon a passenger who had attempted to enter the wrong car.[8]

§ 7. ———. But where a prospective passenger, while seeking to get his trunk checked, provoked a personal quarrel with the baggage-master and was struck by the latter as an act of personal resentment, it was held that the company was not liable.[9]

Whether the same court, however, would now decide this case in the same way, may perhaps be questionable,[10] though the court has recently spoken of it with apparent approval[11] and, unless it could be said that the baggagemaster was not a servant upon whom any duty of protection rested—a conclusion which is certainly questionable,[12] it seems impossible to reconcile the case with others already

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[5] Craker v. Chicago & N. W. Ry. Co., 36 Wis. 657, 17 Am. Rep. 504. See also Strother v. Railroad Co., 123 N. Car. 197; Fick v. Chicago, etc. R. Co., 68 Wis. 469, 32 N. W. 527.

[6] Chicago & Eastern R. R. Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 33.

[7] Stewart v. Brooklyn &c. R. R. Co., 90 N. Y. 588, 43 Am. Rep. 185.

[8] McKinley v. Chicago & N. W. Ry. Co., 44 Iowa, 314, 24 Am. Rep. 748.

The same rule is applied where the conductor struck a passenger, his anger aroused by an insulting epithet used by the passenger: B. O. R. R. Co. v. Barger, 80 Md. 23, 30 Atl. 560, 45 Am. St. Rep. 319, 26 L. R. A. 220; Williams v. Gill, 122 N. C. 967, 29 S. E. 879. And where a street-car conductor, incensed at a passenger for pulling the bell cord, struck him: Birmingham, etc. Co. v. Baird, 130 Ala. 334, 30 So. 456, 54 L. R. A. 752. A street car company was held in contract where its motorman grossly insulted a woman passenger, although he did not attempt to touch her: Knoxville Traction Co. v. Lane, 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549. And where a Pullman porter refused to redeliver a ticket to a passenger, and, upon remonstrance knocked him down, there was held to be evidence on which a jury should pass as to whether he was acting in the scope of his employment: Dwinelle v. N. Y. Cent. etc. R. R. Co., 120 N. Y. 117, 24 N. E. 319, 17 Am. St. Rep. 611, 8 L. R. A. 224. Also where a baggageman made an unprovoked assault on a passenger: Haver v. Central R. R. Co., 62 N. J. L. 282, 41 Atl. 916, 72 Am. St. Rep. 647, 43 L. R. A. 84. Likewise where excessive and unnecessary force was used in compelling a second-class passenger to keep on the second-class deck: N. J. Steamboat Co. v. Brockett, 121 U. S. 637.

[9] Little Miami R. R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373.

[10] Passenger R. R. Co. v. Young, 21 Ohio St. 518, 8 Am. Rep. 78; Stranahan Co. v. Coit, 55 Ohio St. 398, 45 N. E. 634, 4 L. R. A. (N. S.) 506; Nelson Business College v. Lloyd, 60 Ohio St. 448, 54 N. E. 471, 71 Am. St. Rep. 729, 46 L. R. A. 314.

[11] See Nelson Business College Co. v. Lloyd, supra.

[12] That a passenger is entitled to protection from assaults by a baggage-master while lawfully doing business with him, see Georgia R. R. Co. v. Richmond, 98 Ga. 495, 25 S. E. 565; Daniel v. Petersburg R. R. Co., 117 N. C. 592, 23 S. E. 327, 4 L. R. A. (N. S.) 485; (but see comments on this case in Bowen v. Ill. Cent. R. R. Co., 69 C. C. A. 444, 136 Fed. 306). In the case of a freight agent, see Columbus Ry. Co. v. Christian, 97 Ga. 56, 25 S. E. 411.

cited. It has moreover been held in several recent cases, at least where the servant, like the conductor of a passenger vehicle, is charged with the duty of protection, that aggravating conduct or abusive language, on the part of the passenger, furnishes no justification for an assault by the conductor, though it may possibly be used by way of mitigation of damages. It is the duty of the conductor, in such a case, to eject the disorderly passenger and not to beat him.[13]

§ 8. ———. The difficulty in the application of this principle is in determining what are the cases in which there is such a special duty as that upon which the rule is based. It has been suggested that the doctrine should be confined to cases in which the duty is a contractual one, but the courts have long since gone far beyond this point. Thus it has been applied in the case of an express company to make the company liable for abusive language applied by its agent

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[13] In Baltimore and O. R. R. Co. v. Barger, 80 Md. 23, 30 Atl. 560, 45 Am. St. Rep. 319, 26 L. R. A. 220, it was said: "If the plaintiff persisted in misbehaving on the train either by the use of foul and abusive language toward the conductor, or in any other way calculated to frighten or materially interfere with the comfort and safety of the other passengers, after being admonished by the conductor, the latter would have been justified in ejecting him from the train. The remedy in such case would be to eject the unruly passenger—not to assault him and then let his employer escape all liability, because he, the conductor, was carrying out a 'personal purpose and feeling.'"

In Birmingham, etc., Co. v. Baird, 130 Ala. 334, 30 So. 456, 89 Am. St. R. 43, 54 L. R. A. 752, the court said: "Of course a conductor has the right of self-defense against the assault of a passenger; but the right is the same in this connection as in criminal law. He must be imperiled and he must be without fault. To be sure he need not retreat from his car. And he may assault a passenger when necessary to protect other passengers from assault, using no more than necessary force and this may become a duty—indeed it is a duty whenever it is a right. But he cannot assault a passenger in retaliation for an assault committed upon himself or upon another passenger, and a fortiori, he cannot assault a passenger for abusive words, or in revenge or punishment under any circumstances. And if he does assault a passenger otherwise than under a necessity to defend himself or a passenger from battery or in rightfully ejecting a passenger who by his conduct toward other passengers has forfeited his right of carriage, the carrier is liable. The fault of the passenger short of producing a necessity to strike in self-defense will neither justify the conductor in striking, nor relieve the carrier from liability for his act. Possibly such fault could be considered in mitigation of damages."

To same effect: Weber v. Brooklyn, etc., R. R. Co., 47 App. Div. 306, 62 N. Y. Supp. 1 (dissenting from Scott v. Central Park, etc., R. R. Co., 53 Hun 414, 6 N. Y. Supp. 382); Williams v. Gill, 122 N. C. 967, 29 S. E. 879.

A number of cases distinguish between abusive language or sneering and contemptuous conduct, on the one hand, and an actual physical assault upon the servant, which incites him to violence. See East Tenn., etc., R. R. Co. v. Fleetwood, 90 Ga. 23, 15 S. E. 778; Columbus & Rome Ry. Co. v. Christian, 97 Ga. 56, 25 S. E. 411; Georgia R. R. etc. Co. v. Richmond, 98 Ga. 495, 25 S. E. 565; City Elec. Ry. Co. v. Shropshire, 101 Ga. 33, 28 S. E. 508; Wise v. South Covington etc. R. R. Co., 17 Ky. Law Rep. 1359, 34 S. W. 894; Coggins v. Chicago etc. R. R. Co., 18 Ill. App. 620; Williams v. Gill, 122 N. C. 967, 29 S. E. 879.

in charge of its office to one coming there on business with the company. The court said that the case was analogous to the case of carriers of passengers, and that the company "is bound," in Judge STORY'S language, "for respectful treatment and for decency of demeanor."[14] It has been applied to the proprietor of a theater to make him liable for the malicious assault of a ticket-seller and a special policeman upon a patron of the theater. The court said: "Common carriers, inn-keepers, merchants, managers of theaters, and others, who invite the public to become their patrons and guests, and thus submit personal safety and comfort to their keeping, owe a more special duty to those who may accept such invitation. Such patrons and guests have a right to ask that they shall be protected from injury while present on such invitation, and particularly that they shall not suffer wrong from the agents and servants of those who have invited them."[15]

§ 9. ———. It has been applied to a county fair association to make it liable for an attack upon a patron, made by a watchman, guard or special policeman, employed by it. Said the court: "Those who visit public places in response to invitation made generally or otherwise have a right to personal protection while there, especially so as against assault from the agents and servants of the person or corporation extending such invitation."[16]

It has been applied, although not without dissent, to inn-keepers, whose servants have maliciously assaulted guests.[17] It has been applied to a saloon-keeper, to impose liability for a malicious assault made by his cook and his bar-tender upon a person, who had for some days "been a guest and a patron of the defendant's saloon," and who, having spent all his money there, had gone there to sleep.[18]

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[14] Richberger v. Am. Express Co., 73 Miss. 161, 18 So. 922, 55 Am. St. Rep. 522, 31 L. R. A. 390. (But see Bowen v. Ill. Cent. R. R. Co., 69 C. C. A. 444, 136 Fed. 306; Lynch v. Florida, etc., Ry. Co., 113 Ga. 1105, 39 S. E. 411; Hudson v. Missouri, etc., Ry. Co., 16 Kan. 470).

[15] Dickson v. Waldron, 135 Ind. 507, 34 N. E. 506, 35 idem 1, 41 Am. St. Rep. 440, 24 L. R. A. 483.

[16] Brooks v. Jennings County etc. Assn., 35 Ind. App. 221, 73 N. E. 951. To same effect, Oakland etc. Society v. Bingham, 4 Ind. App. 545, 31 N. E. 383; Indianapolis St. R. Co. v. Dawson, 31 Ind. App. 605, 68 N. E. 909.

[17] Wade v. Thayer, 40 Cal. 578. See also DeWolf v. Ford, 193 N. Y. 397, 86 N. E. 527. But see dictum in Evansville & Crawfordsville R. R. Co. v. Baum, 26 Ind. 70, to the effect that he is not liable. There is, however, a contrary dictum in Dickson v. Waldron, supra. See also Curtis v. Dinneen, 4 Dak. 245, 30 N. W. 148. See also Clancy v. Barker, 131 Fed. 161.

[18] Curran v. Olson, 88 Minn. 307, 92 N. W. 1124, 97 Am. St. Rep. 517, 60 L. R. A 733. Followed in Beilke v. Carroll, 51 Wash. 395, 98 Pac. 1119, 130 Am. St. Rep. 1103, 22 L. R. A. (N. S.) 527. See also Mastad v. Swedish Brethren, 83 Minn. 40, 85 N. W. 913, 85 Am. St. Rep. 446, 53 L. R. A. 803; Rommel v. Schambacher, 120 Pa. 579, 11 Atl. 779, 6 Am. St. Rep. 732.

Liability however was denied in an almost precisely similar case.[19]

§ 10. ——— It has been applied to the proprietors of shops and stores to make them liable for wanton and wilful injuries committed by their employees there to persons properly coming there as patrons.[20] But its applicability to such cases has been most vigorously denied and the principle declared applicable only to carriers as to their passengers and to hotels, theaters, steam-boats and like places as to their guests.[21]

It has also been applied to telegraph companies to make them responsible for injuries caused to third persons by false and fraudulent messages sent over their wires by an agent to whom they had confided the performance of the duty which the court declared they owed to the public not to knowingly send false or forged messages. The case of the carrier of passengers was thought to furnish an analogy.[22]

It has been applied where a master knew that his servants were in the habit of wantonly throwing missiles from his premises upon adjoining premises and took no steps to prevent it.[22a]

§ 11. ———. In a case in Wisconsin,[23] in which state the doctrine as applied to carriers, has found very striking illustration, the court extended it to the case of the driver of a vehicle passing another

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[19] Anderson v. Diaz, 77 Ark. 606, 92 S. W. 861, 113 Am. St. Rep. 180, 4 L. R. A. (N. S.) 649.

See also Bergman v. Hendrickson, 106 Wis. 434, 82 N. W. 304, 80 Am. St. Rep. 47.

[20] Swinarton v. Boutillier, 7 Misc. (N. Y.) 639, 28 N. Y. Supp. 53, (affirmed without opinion in 148 N. Y. 752) where a customer was struck in the eye by a pin "snapped" by a mischievous cash-boy. Mallach v. Ridley, 24 Abbott's New Cases (N. Y.) 172, 9 N. Y. Supp. 922, where a customer was wrongfully accused of shoplifting and was subjected to search and other humiliations.

[21] Bowen v. Ill. Cent. R. R. Co., 69 C. C. A. 444, 136 Fed. 306. In this case the sole and general agent of the railroad company at a small station who had charge of the sale of tickets and the receipt and delivery of freight, while at his ticket window was approached by a patron of the company who made an inquiry respecting demurrage on a car-load of freight. He answered the question and as the questioner started to go away, called him back, saying he had received a package for him. While the patron was standing at the desk and signing or about to sign a receipt for the alleged package, and without any controversy or altercation taking place, the agent suddenly seized a revolver and shot and killed the patron. In an action by his widow, it was held that the railroad company was not liable. See also Lynch v. Florida etc. Ry. Co., 113 Ga. 1105, 39 S. E. 411; Christian v. Columbus & Rome Ry. Co., 79 Ga. 460, 7 S. E. 216; Hudson v. Missouri, etc. Ry. Co., 16 Kan. 470.

[22] McCord v. Western Union Tel. Co., 39 Minn, 181, 39 N. W. 315, 12 Am. St. Rep. 636. See also Bank of Palo Alto v. Pacific Postal Tel. Cable Co., 103 Fed. 841; Dougherty v. Wells, Fargo & Co., 7 Nev. 368.

[22a] Hoggle v. Franklin Mfg. Co., 128 N. Y. App. Div. 403, relying upon Clifford v. New York, etc., R. Co., 111 N. Y. App. Div. 809; Carpenter 1. Boston & Albany R. Co., 97 N. Y. 494; Swinarton v. Le Boutillier, 7 N. Y. Misc. 639; Conradt v. Clauve, 93 Ind. 476; Fletcher v. Baltimore, etc. R. Co., 168 U. S. 135.

[23] Schaefer v. Osterbrink, 67 Wis. 495, 30 N. W. 922, 58 Am. Rep. 875.

upon the highway. Calling to mind the theory as one applying to the case of a principal who owes a duty to third persons and confides its performance to an agent, the court said: "It is claimed that no such duty here existed. The mere fact that the conductor's duty to the passenger in the case [*Craker* v. *C. & N. W. R. Co.*[24]] arose out of the passenger's contract with the master does not confine the principle involved to the breaches of duty created by contract. * * * A duty may and often does exist without any contract. Two teams upon a public highway, each with a sleigh or vehicle, coming in close proximity to each other, the driver of each most certainly owes a duty to those riding with the other. That duty is created by law, and requires each driver to proceed with care and circumspection and with reference to the shifting situation of the other. When such driver is a servant acting within the course and scope of his employment, then such duty rests upon the master as well as the servant. The employer in such case, being responsible for the performance of such duty by his delegated agency, can no more escape liability for such failure when it occurs through his agent's gross negligence or wilful misconduct, than he can when it is by reason of his agent's want of ordinary care."

§ 12. ———. The duty which the court here refers to was not one imposed by any special statute,[25] but apparently the general duty which the law imposes to exercise due care under the circumstances. It is obvious that if this conclusion be sound, there are very few cases of negligence in which the rule may not be applied, and the liability for malicious acts, under the doctrine now being considered, instead of being an exceptional one, becomes the ordinary case.

§ 13. II. WHERE MASTER CONFIDES TO SERVANT THE CARE OF A DANGEROUS INSTRUMENTALITY.—In an early English case, at *nisi prius,* it was held as a ground for imposing liability upon the master for his servant's negligence in mis-managing the master's carriage, that "whenever the master has entrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it. * * * The master in such a case will be liable and the ground is that he has put it in the servant's power to mis-manage the carriage, by entrusting him with it."[26] This reasoning, as a ground for imposing liability in the ordinary case, is wholly

[24] 36 Wis. 657, 17 Am. Rep. 504.

[25] The common statute prescribing the conduct to be pursued by teams meeting upon the highway, which is to be found in Wisconsin as elsewhere, did not apply to the case, as here both teams were going in the same direction.

[26] Sleath v. Wilson, 9 C. & P. 607.

unsound and has long since been generally abandoned.[27] As a ground, however, for holding the master liable for his servant's malicious acts in cases which otherwise might not be brought within the scope of the authority, a doctrine somewhat similar to the ones discussed in the preceding sections, has lately been advanced. It is that wherever the master, having under his control some specially dangerous agency or instrumentality, and which he is therefore under special obligation to keep with care, confides this duty to his servant or agent, he will be responsible if the duty be not performed, whether through the negligence or the wantoness or the malice of his servant or agent. "The inability of the master," it is said in one case,[28] "to shift the responsibility connected with the custody of dangerous instruments, employed in his business, from himself to his servants entrusted with their use, is analagous to, and may be said to rest upon the same principle, as that which disenables him from shifting to an independent contractor, liability for negligence in the performance of work that necessarily tends to expose others to danger, unless the work is carefully guarded."

§ 14. ———. This doctrine has been applied in a great many cases where servants in charge of locomotive engines have, though wantonly and intentionally, blown the whistle or let off steam so as to frighten the plaintiff's horses.[29] It has been applied where a railway conductor, though wantonly and capriciously, employed railway torpedoes, confided to his charge for proper use, to frighten passengers in a car. "He was not, it is true," said the court, "within his employment as to the use of them, but, in so doing, he violated the duties connected with his employment as the custodian of them and thereby made his master liable."[30]

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[27] See, for example, Storey v. Ashton, L. R. 4 Q. B. 476; Slater v. Advance Thresher Co., 97 Minn. 305, 107 N. W. 133, 5 L. R. A. (N. S.) 598; St. Louis, etc., Ry. Co. v. Harvey, 75 C. C. A. 536, 144 Fed. 806.

[28] Pittsburg, etc. Ry. Co. v. Shields, 47 Ohio St. 387, 24 N. E. 658, 21 Am. St. Rep. 840. 8 L. R. A. 464; see also Harriman v. Ry. Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507.

[29] Toledo, etc. R. Co. v. Harmon, 47 Ill. 298, 95 Am. Dec. 489; Chicago, etc. R. Co. v. Dickson, 63 Ill. 151, 14 Am. Rep 114; Nashville, etc. R. Co. v. Starnes, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 297; Regan v. Reed, 96 Ill. App. 460; Texas, etc. R. Co. v. Scovill, 62 Fed 730, 10 C. C. A. 479, 27 L. R. A. 179; Ga. R. R. Co. v. Newsome, 60 Ga. 492; Billman v. R. Co., 76 Ind. 176, 40 Am. Rep. 230; Alsever v. Minneapolis, etc, R. Co., 115 Ia. 338, 88 N. W. 841, 56 L. R. A. 748; Bittle v. Camden, etc. R. Co., 55 N. J. L. 615, 28 Atl. 305; Stewart v. Lumber Co., 146 N. Car. 47, 59 S. E. 545; Cobb v. Columbia R. Co., 37 S. C. 194, 15 S. E. 878; Skipper v. Clifton Mfg. Co., 58 S. C., 143, 36 S. E. 509.

Contra: Stephenson v. So. Pac. Ry Co., 93 Cal. 558, 29 Pac. 234, 27 Am. St. Rep. 223, 15 L. R. A. 475. See also Hahn v. So. Pac. Ry. Co., 51 Cal. 605

[30] Pittsburg, etc. Ry. Co. v. Shields, 47 Ohio St. 387, 24 N. E. 658, 21 Am. St. Rep. 840, 8 L. R. A. 464. In this case, a freight conductor had been entrusted with torpedoes,

§ 15. ———. In order to impose liability in these cases it is, however, held to be essential that the servant whose act is complained of shall be the one to whose custody the article was confided and that it was permitted to do the injury while in his custody as such servant.[31] It would seem to be a necessary qualification of this doctrine that liability would attach if the injury was done because the servant negligently permitted the article to get beyond his control in the course of his employment.

§ 16. ———. It is also held in several cases (though there are cases apparently contrary) that it must further appear that the use to which the servant puts the dangerous instrumentality is one which might be justified by his employment, and that the master will not be liable where the servant, even though temporarily, diverts it from the master's business and uses it as the instrument of his own malice or amusement.[32] The obvious tendency of this rule is greatly to

made of highly explosive materials, to be used in signalling. The conductor placed some of them on the track for the purpose of frightening some women in the caboose. One failed to explode, and the plaintiff, a boy, picked it up, carried it a short distance, exploded it by hitting it with a rock, and was badly injured. The court allowed him to recover from the railroad.

In Sullivan v. L. & N. R. R. Co., 115 Ky. 447, 74 S. W. 171, 103 Am. St. Rep. 330, the foreman of the switching crew, as a prank took a torpedo from the engine box and placed it on the track, to frighten the engineer. It exploded and a flying piece of it struck and injured the plaintiff. The court held the company not liable, on the ground that the switchman had entirely departed from his employment.

In Merschel v. L. & N. R. R. Co., 121 Ky. 620, 85 S. W. 710, the petition alleged that a servant of defendant was entrusted with the care and custody of torpedoes, and negligently left one of them exposed where children were accustomed to be; that the plaintiff picked it up, and impelled by curiosity struck it with a hammer, and was injured. The defendant demurred, partly because the petition did not allege the servant to have been acting within the scope of his employment. The court overruled the demurer, saying that if the care of a dangerous machine was entrusted by a master to a servant, he is liable for any injuries proceeding from negligence in the care of same. The court distinguished the case of Sullivan v. L. & N. R. R. Co., supra, on the ground that in that case the servant who was at fault was not the one entrusted with the care of the instrument.

[31] Obertoni v. Boston & Maine R. R., 186 Mass. 481, 71 N. E. 980, 67 L. R. A. 422, is probably to be placed upon this ground. There the plaintiff, a small boy, picked up a railroad torpedo upon a railroad crossing, took it home, attempted to crack it with a rock and was seriously injured. In attempting to account for its presence on the crossing, there was testimony tending to show that the brakeman and the flagman at the crossing had been tossing the torpedo back and forth between themselves, that finally the brakeman tossed it to the flagman, that he did not catch it, that it fell to the ground, and that both brakeman and flagman resumed their duties without picking it up. It did not appear where the torpedo came from, or that it had ever been confided to the care or custody of either of these servants. The court held that from these facts there was no evidence of negligence on the part of the railroad company. The court referred to the Ohio cases above cited, and declared that while they were entitled to great consideration they were not in accordance with the law of Massachusetts.

[32] In Galveston, etc. Ry. Co. v. Currie, 100 Tex. 136, 96 S. W. 1073, 10 L. R. A. (N. S.) 367, it appeared that the railway company had in the round-house an apparatus by which compressed air of great force could be supplied at engine stalls and

limit the master's liability. The master is not liable wherever a servant to whom he has committed the custody of a dangerous instrumentality has allowed it to escape, (unless indeed he be the general custodian) but only when it was permitted to escape while be-

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other places for use in repairing and cleaning engines. One of its servants N., had general charge of the matter of getting engines into the round-house, putting them in readiness for further use and getting them out again as needed. Upon a certain day this compressed air had been used in cleaning an engine. Its use for the particular purpose was novel and N. and a number of other servants had gathered around the engine to observe it. After the use of the compressed air had ceased, but while the work of getting the engine in readiness was still progressing, N. took up the air valve and, in sport, opened the valve and ejected some of the air against one of the workmen, causing him to jump and the others to laugh. N. thereupon turned the air against another workman, who happened to be leaning over in such a position that the air penetrated and perforated his bowels and caused his death. The physician who attended him testified that he would have previously thought such an occurrence impossible and that it was the most remarkable accident of which he had ever heard. In an action to recover damages it was held that the railway company was not liable. [Almost identical in facts and holding is Ballard v. Louisville, etc. R. Co., 128 Ky. 826, 110 S. W. 296, 16 L. R. A. (N. S.) 1052.] With reference to the particular ground of liability now being considered, namely, the confiding of dangerous instrumentalities to the agent's care, the court contended that that doctrine could not be extended so far as to make the master liable for every use to which the dangerous instrument might be put by the servant. It must be a use which would be within the scope of the employment. If a butcher, said the court, should put into the hands of his servant a knife with which to slaughter animals in the master's business, and the servant while standing with the knife raised for that purpose should, upon seeing an enemy standing near, suddenly plunge it into the breast of the enemy, would any one contend that the master would be responsible? Or, if the engineer of a locomotive engine should take fire from the fire-box of the engine and burn a building to gratify his malice or light a bonfire for his amusement from which fire should spread and do injury, would the master be liable? The court dissented from certain of the language used in Pittsburg, etc. R. R. Co. v. Shields, 47 Ohio St. 387, cited supra, and Euting v. Chicago, etc. R. R. Co., 116 Wis. 13, cited supra, though it thought the actual conclusions in those cases not inconsistent with its own. See also Canton Cotton Warehouse Co. v. Poole, 78 Miss. 147, 28 So. 823, 84 Am. St. Rep. 620, where the master was held not liable because a night-watchman left in charge of the master's machinery let off steam from the master's boiler as a practical joke upon some boys who were on the premises, whereby one of them was injured.

See also Evers v. Krouse, 70 N. J. L. 653, 58 Atl. 181, 66 L. R. A. 592, where it appeared that the defendant's minor son, while sprinkling the defendant's front lawn by means of garden hose, by defendant's direction, turned the hose in a spirit of mischief upon the plaintiff's horse which was standing on the opposite side of the street, causing it to run away and do injury. The defendant was held not responsible. The act, said the court, though accomplished by defendant's tool was prompted solely by the servant's malice or mischievousness and had no connection with defendant's business. So in Chicago, etc. Ry. Co. v. Epperson, 26 Ill. App. 72, it appeared that the fireman upon one of defendant's engines while the train was standing at a station, went to the caboose and took from the drawer in which they were kept a number of signal torpedoes which he placed upon the track where they were later exploded, causing injury to the plaintiff. The torpedoes were under charge of the conductor and he alone had power to direct their use. The fireman had no authority to obtain or use them, and his act was prompted solely by his own spirit of mischief. The conductor did not know that they had been taken until after their explosion. It was held that the defendant was not liable.

In International, etc. R. R. Co. v. Cooper, 88 Tex. 608, 32 S. W. 517, the engineer and fireman on one of defendant's locomotives permitted the plaintiff to ride upon the

ing used by a servant authorized to use it and while being used within the general scope of the employment.

§ 17. ———. The doctrine here involved, like the one considered in the preceding sections, is ordinarily deemed to rest upon some exceptional element in the situation; there a special duty, here a specially dangerous instrumentality, giving rise to a special duty. In this case as in that one, it is not always easy to determine what are to be deemed dangerous instrumentalities within the meaning of the rule, and there is undoubtedly a tendency in many places, in this case as in that, to push the rule beyond its original limits. If the doctrine has any justification at all, it lies in the fact that according to the ordinary experience of men, certain agencies and instrumentalities are so inherently and essentially dangerous as to be in themselves a menace to safety unless they are guarded with special care. It is not that they may be made the means of doing injury, because the most inherently harmless thing may be so used, but that it is dangerous in itself. A hammer or a billet of wood is not in itself a dangerous object, though in the hands of an angry and excited man, it may be made the means of severe injury. "Poison," it was said in one case,[33] "is a dangerous substance. Gunpowder is the same. A torpedo is a dangerous instrument, as is a spring gun, a loaded rifle, or the like. They are instruments and articles in their nature calculated to do injury to mankind, and generally intended to accomplish that purpose. They are essentially and in their elements instruments of danger."

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locomotive. In order to play a practical joke upon Cooper, the fireman quietly slipped an end of a hose, connected with the engine, into Cooper's pocket, and the engineer opened a valve to which the hose was attached, intending to turn on cold water but by mistake turning on boiling water and steam whereby Cooper was severely burned. The defendant was held not liable. "The injury did not occur from anything done in the performance of such duty but by the independent act of the servants, in nowise connected with the duties thus being performed. It is true that circumstances might have required the discharge of hot water from the boiler by means of the appliances used in this instance, but upon this occasion the evidence shows that the act done was not for the purpose of discharging a duty, but simply as one of sport and mischief on their part towards the injured party."

See also Cobb v. Columbia, etc. R. R. Co., 37 S. C. 198, 15 S. E. 878.

Contra: The case of Merschel v. Louisville, etc. R. Co., 121 Ky. 620, 85 S. W. 710, seems to be contra. The court seems to hold that it is immaterial whether the torpedo which caused the injury was negligently left by its custodian upon the railroad track [where he might have ocasion to put it in the course of his employment] or upon the street [where, so far as appears, he could never have any occasion to put it at all.]

The implications of Pittsburgh, etc., R. Co. v. Shields, 47 Ohio St. 387, 24 N. E. 658, 21 Am. St. Rep. 840, 8 L. R. A. 464, are also contra, although possibly the particular case might be brought within the rule stated. The employee put the torpedo where he might lawfully and properly put it under many circumstances: he did not put it there at this particular time for any purpose connected with the service.

[33] Loop v. Litchfield, 43 N. Y. 351, 1 Am. Rep. 453.

§ 18. ———. Within the meaning of this rule, it has been held that locomotive engines, with steam up and out upon the track, are, at least with respect of the steam employed, dangerous instrumentalities.[34] Signal torpedoes fall within the same category;[35] and many cases involving poisons, fire-arms, explosives and the like are referred to in preceding sections. On the other hand, an automobile,[36] a railway hand-car,[37] a hatchet,[38] a horse and cart,[39] and many similar articles of common use[40] have been held not to be dangerous instrumentalities within this rule.

§ 19. III. WHERE THE MASTER ENTRUSTS TO SERVANT PERFORMANCE OF DUTIES INVOLVING THE USE OF FORCE.—Another class of cases in which it is sometimes said that the master may be under a special responsibility for his servant's wilful, wanton or malicious act, are the cases wherein the master has confided to the servant the performance of dutes which may involve the use of force upon third persons, and has expressly or impliedly committed to the ser-

[34] Toledo, etc. R. Co. v. Harmon, 47 Ill. 298, 95 Am. Dec. 489; Chicago, etc. R. Co. v. Dickson, 63 Ill. 151, 14 Am. Rep. 114; Nashville, etc. R. Co. v. Starnes, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 297; Regan v. Reed, 96 Ill. App. 460; Texas, etc. R. Co. v. Scovill, 62 Fed. 730, 10 C. C. A. 479, 27 L. R. A. 179; Georgia R. Co. v. Newsome, 60 Ga. 492; Billman v. Indianapolis, etc. R. Co., 76 Ind. 176, 40 Am. Rep. 230; Alsever v. Minneapolis, etc. R. Co., 115 Ia. 388, 88 N. W. 841, 56 L. R. A. 748; Cobb v. Columbia R. Co., 37 S. C. 194, 15 S. E. 878; Skipper v. Clifton Mfg. Co., 58 S. C. 143, 36 S. E. 509; Stewart v. Carey Lumber Co., 146 N. Car. 47, 59 S. E. 545.

[35] Pittsburg, etc. R. Co. v. Shields, 47 Ohio St. 387, 24 N. E. 658, 21 Am. St. Rep. 840, 8 L. R. A. 464; Sullivan v. L. & N. R. Co., 115 Ky. 447, 74 S. W. 171, 103 Am. St. Rep. 330; Merschel v. L. & N. R. Co., 121 Ky. 620, 85 S. W. 710.

[36] See Slater v. Advance Thresher Co., 97 Minn. 305, 107 N. W. 133, 5 L. R. A. (N. S.) 598; Lotz v. Hanlon, 217 Pa. 339, 66 Atl. 525, to L. R. A. (N. S.) 202; Cunningham v. Castle, 127 N. Y. App. Div. 580, 111 N. Y. Supp. 1057; Jones v. Hoge, 47 Wash. 663, 92 Pac. 433, 14 L. R. A. (N. S.) 216, 125 Am. St. Rep. 915; Lewis v. Amorous, 3 Ga. App. 50, 59 S. E. 338; Danforth v. Fisher, 75 N. H. 111, 71 Atl. 535, 21 L. R. A. (N. S.) 93; Vincent v. Crandall, etc. Co., 131 N. Y. App. Div. 200; Steffen v. McNaughton, 142 Wis. 49, 124 N. W. 1016, 26 L. R. A. (N. S.) 382; McIntyre v. Orner, 166 Ind. 57, 76 N. E. 750, 117 Am. St. Rep. 359, 4 L. R. A. (N. S.) 1130.

Contra: Ingraham v. Slockamore, 63 N. Y. Misc. 114.

[37] Branch v. International, etc. R. Co. 92 Tex. 288, 47 S. W. 974, 71 Am. St. Rep. 844. See also Dougherty v. Chicago, etc. R. Co., 137 Iowa 257, 114 N. W. 902, 14 L. R. A. (N. S.) 590. But see Salisbury v. Erie Ry. Co., 66 N. J. L. 233, 50 Atl. 117, 88 Am. St. Rep. 480, 55 L. R. A. 578, (a case of a push-car); Barmore v. Vicksburg, etc., R. Co., 85 Miss. 426, 38 South 210, 70 L. R. A. 627.

[38] Little Miami Ry. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373.

[39] Storey v. Ashton, L. R., 4 Q. B. 476.

[40] "The ordinary appliances in use in an ice factory cannot be so classed, certainly not a coal scoop and electric lights:" Canton Cotton Warehouse Co. v. Pool, 78 Miss. 147, 28 South. 823, 84 Am. St. Rep. 620. Neither can a compressed-air hose: Ballard v. Louisville, etc. R. Co., 128 Ky. 826, 110 S. W. 296, 16 L. R. A. (N. S.) 1052. See also Galveston, etc. Ry. Co. v. Currie, 100 Tex. 136, 96 S. W. 1073, 10 L. R. A. (N. S.) 367, —a case almost identical in its facts. Nor a passenger elevator in an office building: Sweeden v. Atkinson Improvement Co., — Ark. —, 125 S. W. 439. Nor a garden hose: Evers v. Krouse, 70 N. J. L. 653, 58 Atl. 181, 66 L. R. A. 592.

vant the determination of the occasion when force is to be used and the degree of force which is to be exercised. "If the master give an order to a servant," it is said in one case,[41] "which implies the use of force and violence to others, leaving to the discretion of the servant to decide when the occasion arises to which the order applies, and the extent and kind of force to be used, he is liable, if the servant in executing the order makes use of force in a manner or to a degree which is unjustifiable." In such a case "if the act be done in execution of the authority given him by his master, and for the purpose of performing what the master has directed, the master will be responsible whether the wrong done be occasioned by negligence or by a wanton or reckless purpose to accomplish the master's business in an unlawful manner."

§ 20. ———. Even under this rule, however, the master would not be responsible for a wanton or malicious act of the servant not committed in the execution of the authority. As stated in one case which has been often cited:[42] "If he is authorized to use force against another when necessary in executing his master's orders, the master commits it to him to decide what degree of force he shall use; and if, through misjudgment or violence of temper, he goes beyond the necessity of the occasion, and gives a right of action to another, he cannot, as to third persons, be said to have been acting without the line of his duty, or to have departed from his master's business. If, however, the servant, under guise and cover of executing his master's orders, and exercising the authority conferred upon him, wilfully and designedly, for the purpose of accomplishing his own independent, malicious or wicked purposes, does an injury to another, then the master is not liable. The relation of master and servant, as to that transaction, does not exist between them. It is a wilful and wanton wrong and trespass, for which the master cannot be held responsible."

§ 21. ———. It is no defense to the liability of the master in such a case (if the act be one within the scope of the authority),

[41] Howe v. Newmarch, 12 Allen (Mass.) 49.

[42] Rounds v. Delaware, etc. R. R. Co., 64 N. Y. 129, 21 Am. Rep. 597.

To same effect, Rogahn v. The Moore Mfg. etc. Co., 79 Wis. 573, 48 N. W. 669; Gray v. B. & M. Ry., 168 Mass. 20, 46 N. E. 397; Aiken v. Holyoke St. Ry. Co., 184 Mass. 269, 68 N. E. 238; Barabasz v. Kabat, 86 Md. 23, 37 Atl. 720; Hoffman v. N. Y. Cent. R. Co., 87 N. Y. 25; Alton Ry. etc. Co. v. Cox, 84 Ill. App. 202; West Jersey, etc. R. Co. v. Welsh, 62 N. J. L. 655, 42 Atl. 736, 72 Am. St. Rep. 659; Letts v. Hoboken R. Warehouse, etc. Co., 70 N. J. L. 358, 57 Atl. 392; Chicago, etc. R. Co. v. Kerr, 74 Neb. 1, 104 N. W. 49; Rowell v. B. &. M. Ry., 68 N. H. 358, 44 Atl. 488; Collins v. Butler, 83 App. Div. 12, 81 N. Y. Supp. 1074; Ramsden v. B. & A. Rr., 104 Mass. 117; Jackson v. Second Ave. Rr. Co., 47 N. Y. 274; Brennan v. Merchant & Co., 205 Pa. St. 258, 54 Atl. 891; Southern Ry. Co. v. James, 118 Ga. 340, 45 S. E. 303, 63 L. R. A. 257.

that the master in conferring the authority to use force had specifically pointed out the extent to which the servant might go or had expressly forbidden the use of excessive force.[43] The rule is of frequent application to the case of the agents or servants of carriers who undertake, with unnecessary or unreasonable force and violence or at improper times and places, to eject from their conveyances persons whom they would be authorized to remove under proper circumstances. But it is by no means confined to such cases. It applies wherever the circumstances bring the case within the operation of the rule regardless of the nature of the occupation.

§ 22. ———. It is of course essential to the operation of this rule that the case shall be one in which the exercise of some degree of force will be permissible. If the master has not authorized the use of force under any circumstances, he can not be liable under this rule for excessive force. Thus where a brakeman who might under proper circumstances have used force to expel a trespasser or to eject a passenger for the non-payment of fare, forcibly expelled a person from the train because he would not give a gratuity to the servant, it was held that the master was not liable within this rule. It was clear that what he did was done for his own purposes, and that he was "using his authority to eject trespassers, if any there were, as a mere cover under which to extort money, not as a fare but for his own pocket."[43a]

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[43] West Jersey, etc., R. Co. v. Welsh, 62 N. J. L. 655, 42 Atl. 736, 72 Am. St. Rep. 659; Letts v. Hoboken, etc., Co., 70 N. J. L. 358, 57 Atl. 392; Barden v. Felch, 109 Mass. 154.

[43a] Illinois Central R. R. Co. v. Latham, 72 Miss. 32, 16 South. 757.

(To be concluded).